utility systems.[161] The easement specifically permitted utilities to "erect and maintain the necessary poles and other necessary equipment" and "to affix and maintain utility wires, circuits and conduits on, above, across, and under the roofs and exterior walls of the residences."[162] Thus, some utility easements provide specifically for rooftop access, and competitors may access that right-of-way pursuant to Section 224.

Even in the absence of a specific reference to rooftop access, permitting wireless CLECs such as WinStar to install antennas on rooftop rights-of-way would not typically exceed the broad rights granted under a utility's easement. Utilities historically were granted broad rights of access to go where needed to install and maintain their systems in MTEs,[163] including access to rooftops.[164] Moreover, it is black letter law that an easement holder is entitled to utilize such technological improvements as are reasonably necessary to carry out the purposes of the easement provided that such use is substantially compatible with the easement granted and does not unreasonably burden the servient estate.[165] It is also permissible for an easement holder to erect

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161 Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1170 (4th Cir. 1991).

162 Id. at 1170-71 (emphasis added). In Media General, the Court determined, under Section 621(a)(2) of the Cable Communications Policy Act of 1984, that a cable company did not have the right to access these easements, which were on private property, because Congress specifically rejected a proposal to give cable franchisees mandatory access to private property. Id. at 1174. However, as discussed in Section V.A., supra, Section 224 encompasses private as well as public rights-of-way.

163 See Gulf Power Co. v. United States, 998 F. Supp. 1386, 1389 (N.D. Fla. 1998).

164 Media General, at 1170.

165 See C/R TV, Inc. v. Shannondale, Inc., 27 F.3d 104, 108 (4th Cir. 1994)("West Virginia cases construe easements to give the easement holder a right 'reasonably necessary' to carry out the purpose of the grant, including the right to utilize technological improvements.") (emphasis added); Centel Cable Television Co. of Ohio, Inc. v. Cook, 567 N.E.2d 1010, 1014 (Ohio 1991)(holding that "the transmission of television signals through coaxial cable by a cable television company constitutes a use similar to the

structures, such as antennas, on an easement where reasonably necessary to carry out the purposes of the easement.[166] A utility choosing to deploy a fixed wireless system, for example, would generally be able to obtain rooftop access to install its antenna under its existing rights-of-way. Therefore, installation of antennas on rooftops is consistent with the broad rights utilities already possess. Moreover, it is consistent with the non-discrimination principle of Section 224 to require utilities to permit access by competitive telecommunications carriers where their rights would allow such access.

In fact, utilities themselves may already view their easements as compatible with the provision of wireless telecommunications services (even if they do not have specific written agreements for access to rooftops), bolstering the conclusion that utilities' easements contemplate access by utilities to rooftops.[167] Indeed, most utilities have deployed private or commercial

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transmission of electric energy through a power line by an electric company"); Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (Ct. App. 1985)(finding that the installation of cable equipment to a pre-existing utility pole did not materially increase the burden on the underlying estate and was consistent with the primary goal of the easement, to provide for . . . transmission of power and communication).

166 See 25 Am. Jur. 2d, Easements and Licenses § 88 (1996)("The erection by the dominant owner of structures that are reasonably necessary to accommodate a reasonable enjoyment of the rights under a grant of a right of way has been regarded as proper, except where they interfered with the rights of the owner of the fee.").

167 Bill Borda, "Utilities Turn to Telecommunications," Wash. Telecom News (April 15, 1996). "Utility companies across the country . . . maintain a huge storehouse of telecommunications facilities. A survey of 129 electric utilities performed by the Utilities Telecommunications Council (UTC) showed that these companies have . . . 43,000 private land mobile radio transmitters, 7,000 point-to-point microwave stations and 1,700 point-to-multipoint microwave stations. Utilities also control massive amounts of poles and right of ways." Id. In addition to the 129 electric utilities surveyed by UTC, there are hundreds of other electric and non-electric utilities that have numerous wireless licenses and systems.

terrestrial wireless systems, including point-to-point and point-to-multipoint systems.[168] The Commission need only examine its own licensing records to see that thousands of microwave, paging, SMR, cellular and other wireless systems are currently being operated by utilities.[169] Beyond the significant portions of the spectrum set aside for private microwave service licensed to utilities, whole land mobile radio service bands are set aside for, and coordinated by, utilities.[170] A review of the number of utilities that have filed for Exempt Telecommunications Company ("ETC") status provides further evidence of utility involvement in wireless telecommunications.[171] Finally, established trade associations have long existed to, in large part, represent the wireless interests of utilities.

If the Commission hopes to bring real competitive choices to consumers, fixed wireless

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168 See id. ("While utilities often have substantial wireless and wireline networks, they only use a fraction of these networks for a number of tasks . . . . Many utilities see dollar signs in those vacant airwaves . . . ."); see also Martha M. Hamilton, "The Power to Link Masses? Pepco Venture to Offer Phone, Cable, Online Service" Washington Post at D4 (May 22, 1998)("[P]ower companies . . . own power-line rights of way reaching into virtually every corner of urban America. Along them they are laying more fiber-optic cable to fill gaps in their communications networks.").

169 For examples of wireless systems maintained by utilities, see <http://www.citizens communications.com/CompanyOverview.cfm> (visited Aug. 2, 1999) (Citizens Communications, a subsidiary of Citizens Utilities, offers cellular and paging services.); <http://www.solinc.com/about.asp> (visited Aug. 2, 1999) (Southern LINC, a subsidiary of Southern Company, offers digital specialized mobile radio service.).

170 See 47 C.F.R. § 90.35(b)(2)(i) & 90.35(b)(3)(setting aside 152 separate frequency bands for coordination by a "power coordinator").

171 See, e.g., In re Consolidated Application of Digital Broadcasting OVS, LLC, and Digivid, Inc., 13 FCC Rcd. 336 (1998) (seeking ETC status for a multichannel video service); In re Application of Entergy ETHC Merger Company, 12 FCC Rcd. 1042227 (1997)(seeking ETC status for alarm monitoring services); In re Application of Allegheny Communications Connect, Inc., 11 FCC Rcd. 12204 (1996) (seeking ETC status for the location and construction of antenna facilities); In re Application of Cinergy Communications, Inc., 11 FCC Rcd. 13941 (1996) (seeking ETC status for the establishment and maintenance of PCS networks).

technology must be considered as a technological innovation that is compatible with the utility's underlying easement. Thus, installation of a small antenna on a rooftop by a fixed wireless provider such as WinStar would not exceed the broad rights of access granted to or acquired by the utilities.

C. Section 224 Encompasses Access To In-Building Conduit, Such As Riser Conduit, By Telecommunications Carriers.

The Notice tentatively concludes that "the obligations of utilities under section 224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by a utility."[172] WinStar agrees. Riser space frequently has unused capacity and/or cables that could be removed to create more space. WinStar requires access to risers and other in-building conduit to carry its signals from the rooftop antenna via coaxial cables to the cross-connect to obtain access to its customers. The Commission can accommodate access to such conduit under Section 224 by classifying riser conduit as a right-of-way through the MTE. Alternatively, the Commission may amend the definition of conduit contained in Section 1.1402(i) of the Commission's Rules to include in-building riser conduit in addition to underground conduit.

D. Utilities Should Be Required To Exercise Their Authority Of Eminent Domain To Make Space Available For Competing Carriers.

WinStar agrees with the Notice that utilities must exercise their powers of eminent domain where necessary to accommodate qualified entities seeking access, just as they must do with respect to pole attachments.[173] The Commission recently emphasized that under Sections 224(f)(1) and 224(f)(2) "[i]f a telecommunications carrier's request for access cannot be

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172 Notice, at ¶ 44.

173 Id. at ¶ 46.

accommodated due to a lack of available space, a BOC must modify the facility to increase capacity under the principle of nondiscrimination."[174] Furthermore, it stated "a lack of capacity on a particular facility does not entitle a BOC to deny a request for access . . ."[175] Thus, the Commission held, because a utility generally is able to expand capacity if its own needs require such expansion, the principle of non-discrimination requires that it do the same for competitive telecommunications carriers.[176]

The same analysis applies to access to rights-of-way on building rooftops and in riser conduit. For example, a utility must be required to exercise its power of eminent domain in order to make rooftop space available to fixed wireless providers if the utility has been permitted access to the MTE to install its system. Similarly, if the utility already owns or controls rooftop space, but this space has been fully used by the utility, it must be required to exercise its authority to make additional space available to accommodate the competing provider's antenna and equipment.[177] Therefore, under Section 224, a utility must exercise its power of eminent domain in order to "establish new rights-of-way for the benefit of third parties" or "to expand existing rights-of-way over private property in order to accommodate a request for access."[178]

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174 In re Application of BellSouth Corp., BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, Memorandum Opinion and Order, 13 FCC Rcd. 20599, at ¶ 176 n.586 (1998).

175 Id.

176 Id.

177 If private property is taken by eminent domain, the owner of the underlying property would receive just compensation for the taking.

178 See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, at ¶ 1181 (1996).

E. Federal Law Should Govern In Determining The Scope Of A Right-Of-Way Under Section 224.

The Notice asks whether the Commission should "offer any guidance regarding the existence or scope of ownership or control" of easements or rights-of-way or "defer entirely to state law."[179] The Commission should adopt the approach described above to ensure a national policy for access to rights-of-way. Although some States are actively pursuing solutions to the problem of access to MTEs, many are not.[180] WinStar and other fixed wireless providers have suffered in States where no action has been taken to promote building access, often because building owners with a national presence penalize carriers in States without building access laws for access gained in other States.[181] Deference to State law definitions of the scope of a right-of-way would run counter to the national approach promoted by Section 224.[182] Hence, a single, appropriately expansive interpretation of the scope of a utility's right-of-way should govern in implementing and enforcing Section 224.[183]

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179 Notice, at ¶ 47.

180 See Section III.C, supra, for a detailed discussion of efforts by various States to enable nondiscriminatory access to MTEs.

181 See Hearing, at 77 (Rouhana Testimony).

182 As discussed in Section V.G., infra, Section 224 contains a reverse preemption provision that permits States to exercise authority over those matters addressed by Section 224. To the extent that a State has exercised its authority over these matters, the State must adhere to the Commission's interpretation of the scope of utilities' rights-of-way.

183 Such an approach would not affect the application of State property law because the Commission's interpretation and analysis would only apply in the context of implementation of Section 224.

F. The Impact Of Permitting Access To Rooftop Rights-Of-Way And Riser Conduit By Competitive Telecommunications Carriers On Property Owners Will Be Minimal And Will Not Result In An Unconstitutional Taking.

The impact of a Commission decision making clear that Section 224 contemplates access to rooftop rights-of-way, riser conduit, and other facilities owned or controlled by utilities will not result in a taking of a building owner's property without just compensation within the meaning of the Fifth Amendment.[184] Section 224 previously has been challenged by utilities and has survived constitutional scrutiny because it provides for the payment of just compensation.[185] Similarly, expansion of utility rights-of-way to accommodate access by telecommunications carriers does not violate the underlying property owners' Fifth Amendment rights. If the utility exercised its eminent domain authority to obtain the right-of-way or relies upon an agreement with the property owner, the property owner will already have received compensation. Likewise, in cases where the utility is obliged to exercise its eminent domain authority to accommodate a telecommunications provider, the property owner also will receive just compensation.

Arguments by property owners that expansion of a utility right-of-way to accommodate telecommunications carriers under Section 224 adds "value" to the property taken are unpersuasive.[186] By enacting Section 224 and other provisions of the 1996 Act, Congress opened the "last mile" to competing providers of telecommunications services. This action by Congress

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184 Notice, at ¶ 47.

185 Gulf Power Co. v. United States, 998 F. Supp. 1386, 1391 (N.D. Fla. 1998)(holding that a taking of private property does not violate the Constitution so long as it provides for just compensation).

186 See Comments of Community Housing Improvement Program, Inc., at 1 (filed July 20, 1999)(noting that "opening [utility] right[s]-of-way could increase the value of the property right taken from the building owner").

should not be interpreted in a perverse way that permits underlying property owners to extract monopoly rents in exchange for access to customers located in MTEs. Rather, Congress' intent to benefit tenants and residents of MTEs should be honored. Thus, the "value" of the 1996 Act is properly conferred to consumers through promotion of competition among telecommunications providers, not owners of MTEs.[187]

Nor will a broad interpretation of utility ownership or control of rights-of-way place an unreasonable burden on the underlying property owners.[188] Allowing access by telecommunications carriers to rights-of-way owned or controlled by utilities over the property of third parties is consistent with the underlying property right granted to the utility. Because property owners have already opened their building to access, the use of these rights-of-way on a technology-neutral basis by competitive providers will not produce a compensable effect. In fact, access by competitive telecommunications carriers will normally increase the value of an MTE because tenants will be presented with a greater choice of telecommunications carriers.

Nonetheless, WinStar has consistently taken the view that nondiscriminatory access to MTEs should not degrade the safety and security of the building or its tenants. Thus, WinStar believes that it is reasonable to require telecommunications carriers to indemnify the property owner for any damages caused by the installation, maintenance, operation, or removal of facilities.

G. The Commission Should Require States To Re-Certify That They Are Regulating Matters Addressed By Section 224.

Section 224 contains a reverse preemption provision that permits States to exercise

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187 See Hearing at 8 (The Telecommunications Act of 1996 mandated a concern for the choice of individuals, not owners or providers, and that only facilities-based competition can give providers the incentive to offer that choice.) (Sugrue Testimony).

188 Notice, at ¶ 47.

authority over those matters addressed by Section 224.[189] The State must certify to the Commission that it regulates pole attachments consistent with Section 224. Because the requirements of Section 224 were radically altered in 1996, State certifications made prior to that time are out of date. Thus, the Commission should require re-certification by the States and should make clear that access to intra-MTE rights-of-way, including rooftop rights-of-way and riser conduit, must be addressed in this State certification. Moreover, the Commission should exercise its authority (previously unexercised) to review such certifications and to ensure that those States truly provide competitors access to utilities' riser conduit and rights-of-way on private property.[190] This recertification will promote the goals of Section 224 and telecommunications competition.

VI. THE COMMISSION SHOULD MODIFY ITS PART 68 RULES AND REQUIRE THAT THE DEMARCATION POINT IN ALL BUILDINGS SHOULD BE AT THE MPOE.

As part of its review of the effect on competition of access to MTEs, the Commission also should implement modifications to its current rules to provide for access to MTE intra-building wire.[191] The Commission's current rules regarding the demarcation point are not sufficient to promote full facilities-based competition in MTEs. Currently, the Commission's rules provide that in MTEs "in which wiring is installed, or major additions or rearrangements of wiring are made, after August 13, 1990, the telephone company may establish a reasonable and nondiscriminatory

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189 47 U.S.C. § 224(c).

190 This is particularly important because only one State that currently exercises its authority over Section 224 has a nondiscriminatory building access requirement in place to allow competitors an alternative means to access MTEs.

191 See Notice, at ¶¶ 65-67.

practice of placing the demarcation point at the minimum point of entry, or, if the telephone company does not establish such a practice, the premises owner shall establish one or more demarcation points."[192] For MTEs with wire installed prior to August 13, 1990, the ILEC is not required to relocate the demarcation point unless the building owner requests it.[193] This means that ILECs do not have the obligation to provide a single demarcation point at the MPOE in the majority of buildings in the U.S., unless a CLEC or consumer can persuade a building owner to request it. However, the building owner has no real incentive to assist a CLEC. As a result, in many instances a CLEC is not able to readily provide competitive service to consumers in a building where wire was installed prior to August 13, 1990, because it must install its own wire to the consumer (which can be an expensive and time-consuming process). A CLEC's alternatives are to (1) remain captured by the ILEC and resell its service, (2) obtain the wire if it can through a UNE provision,[194] or (3) forego providing service in that building.

When the demarcation point is not located at the MPOE, the ILEC, and not the building owner, owns the wire connecting to the consumer's premises. In this case, CLECs must either build their own wire to the consumer or lease these facilities from the ILEC to the consumer. The

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192 See id. at ¶ 65; see also 47 C.F.R. § 68.3(b)(2).

193 See Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd. 11897 at n.104 (1997) (holding that for buildings in which wiring was installed prior to August 13, 1990, the carrier must move the demarcation point to the MPOE at the request of the building owner).

194 As noted in Section VII, infra, WinStar fully supports the Commission treating an ILEC's intra-building wire as a UNE pursuant to Section 251(c)(3), and it has filed comments in another proceeding in support of that option, which the Commission also should take into account in this proceeding. See Comments of WinStar, CC Docket No. 96-98 and 95-185 (filed May 26, 1999), attached hereto as Exhibit Q.

cost and complexity of rewiring existing buildings can add thousands of dollars to the cost of serving just one tenant in a building and, therefore, can significantly delay -- or even prevent -- the introduction of competitive services to an MTE. Unlike ILECs, who typically perform such installations during building construction for every floor and traditionally have been given free access to such wiring thereafter, competitors must expend significant amounts of time and money in order to install their wiring. On the other hand, if a competitor relies on access through the ILEC's wire, through a resale or UNE approach, it must then engage in another negotiation process with an additional party (the ILEC, which is the CLEC's main competitor) to obtain access to the consumer. Furthermore, by permitting the ILEC to locate the demarcation at the customer premises, not the MPOE, the Commission's rules indirectly, but strongly discourage facilities-based competition, which offers the greatest benefits to consumers, in favor of the more limited approaches of resale and UNE-based competition.

Where the demarcation point is located at the MPOE, the ILEC and competitive carriers enter the MTE on an equal basis. Such an approach is both technically and practically feasible, as demonstrated by those States that already require ILECs to locate the demarcation point at the MPOE in MTEs. For example, in Nebraska, an ILEC must provide, upon request, the demarcation point at the MPOE of a building for a CLEC to interconnect with the intra-building wire.[195] In California, the Public Utilities Commission required Pacific Bell to establish the demarcation point in MTEs at the MPOE and to convey ownership of the intra-building wire to

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195 See In the Matter of the Commission, on its Own Motion, to Determine Appropriate Policy Regarding Access to Residents of Multiple Dwelling Units (MDUs) in Nebraska by Competitive Local Exchange Telecommunications Providers, Application No. C-1878/PI-23, Order Establishing Statewide Policy for MDU Access, slip op. (Nebraska PSC, entered March 2, 1999).

the building owner.[196] Finally, in Minnesota, the Public Utilities Commission also requires the location of the demarcation point at the MPOE.[197] In these States, competitors can access intra-building wire, with the building owner's permission, to offer tenants of MTEs a competitive service. Thus, rather than being forced to rewire the building or to depend on the ILEC's network, competitors are placed on more equal footing vis a vis the ILEC.

To promote facilities-based competition in MTEs throughout the U.S., the Commission should follow the lead of the several States discussed above and designate the MPOE as the inside wire demarcation point for all commercial and residential MTEs, regardless of when the building was wired. Similarly, the rules should apply even if the building owner prefers the demarcation point at another location. Finally, the Commission should give CLECs the right to access the wiring blocks at the MTE's MPOE when there are cross-connect facilities at the MPOE without the need for ILEC personnel to be present.

VII. UNBUNDLED ACCESS TO INTRA-MTE WIRING SHOULD BE REQUIRED TO ENSURE FLEXIBILITY FOR COMPETITIVE TELECOMMUNICATIONS PROVIDERS SEEKING TO SERVE CONSUMERS IN MTEs.

WinStar fully supports designating intra-MTE wiring as a UNE under Section 251(c)(3) of the Act.[198] WinStar has submitted Comments in CC Docket Nos. 96-98 and 95-185 outlining

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196 In addition, Pacific Bell must provide to CLECs vacant space in existing entrance facilities, such as conduit, in MTEs up to the MPOE. The PUC stated that this would permit CLECs "to gain access to building cellars, telephone closets, and network interconnection devices (NIDs) in such buildings." Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, R.95-04-043; I.95-04-044, Decision 98-10-058, slip op. at 159 (Cal. PUC, Oct. 22, 1998).

197 In the Matter of the Deregulation of the Installation and Maintenance of Inside Wiring based on the Second Report and Order in FCC Docket 79-105 Released February 24, 1986, Docket Nos. P-999/CI-86-747 and P-421/C-86-743, Order, 1986 Minn. PUC LEXIS at *9-10 (Minn. PUC, Dec. 31, 1986).

198 Notice, at ¶ 51.

the Commission's authority to establish intra-MTE wiring as a UNE.[199] Ideally, WinStar would prefer to install its own wiring in order to avoid the economic inefficiencies and antiquated technologies often associated with ILEC facilities and services. However, as discussed above, there are instances in which the technical complexities and simple economics of rewiring existing buildings mandate against such an approach. Thus, competitors such as WinStar must have the option of utilizing the preexisting inside wire in order to reach consumers in MTEs.

For CLECs that construct their own facilities to an MTE, it is important to have access to the ILEC's wiring from the entrance facilities of the MTE to the demarcation point, where the ILEC's network ends.[200] Thus, the Commission should identify as a UNE the ILEC's intra-MTE wiring, extending from the building entrance facilities to the demarcation point. CLECs should not be required to lease an entire loop from the ILEC solely to have access to this small but important portion of the ILEC's network. In addition, CLECs must be able to interface with the portion of the intra-MTE wiring that is not owned by the ILEC, i.e., on the customer side of the demarcation point. Thus, CLECs must have access to the ILEC's NID, which must also be identified as a UNE.[201] Moreover, the NID must be identified separately as a UNE, rather than

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199 See Exhibit Q.

200 Where the demarcation point is not located at the MPOE, a portion of the ILEC's network extends into the building up to the location of the demarcation point, where the ILEC's network ends.

201 A number of states, including New York, Oregon, Florida, Georgia, Kentucky, and Louisiana, require the ILEC to make the NID available as a UNE. See, e.g., Proceeding on the Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Case 98-C-1357, Order Allowing Deaveraging Tariff Filing to Take Effect, Slip Op. (May 28, 1999)("Competing carriers are given access to the incumbent's NID as a network element, so that the competing carrier may connect its loops to a customer's inside wiring."); In re US WEST Communications, Inc., Order No. 98-444, Slip Op. (Nov. 13, 1998)("The CLEC may connect its NID to the USWC NID to gain access to the customer's inside wiring.").

combined with the intra-MTE wiring. If the two were combined, CLECs constructing their own wiring would have to purchase the ILEC's wiring simply to interface with the NID, which would be inefficient and would promote reliance on the ILEC's network.

VIII. THE COMMISSION MUST GRANT THE JOINT PETITION FOR RECONSIDERATION OF THE COMMISSION'S SECOND REPORT AND ORDER IN THE OTARD PROCEEDING.

WinStar is a party to a joint Petition for Reconsideration of the Second Report and Order in the over-the-air reception device ("OTARD") proceeding.[202] The directives in Section 207 are broad. Section 207 covers restrictions by MTE owners or managers against access to common and restricted use areas for the placement of Section 207 devices. WinStar urges the Commission to grant the Joint Petition for Reconsideration and to preempt MTE restrictions on access to common and restricted use areas for Section 207 antennas. Arguments supporting a grant of the Joint Petition are summarized below.

A. Congress' Directives In Section 207 Are Broad And Were Intended To Cover Consumers' Use Of Section 207 Devices In Common And Restricted Areas.

Section 207 requires the Commission to promulgate regulations that prohibit restrictions on receipt of video programming from over-the-air-reception ("OTARD") devices. Such prohibited restrictions include the refusal of a building owner, landlord, or condominium association to permit a viewer to receive video programming from a device in common areas or restricted use areas. While the Commission has promulgated rules of relatively limited practical impact that, for example, prohibit civic associations from restricting landowners' use of Section 207 devices, and protect renters from landlords' restrictions on installation of Section 207 devices

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202 See Exhibit B.

on property under renters' exclusive use, the overwhelming majority of the public entitled to the protection of Section 207 was left absolutely unprotected by the Commission's rules. Unprotected by Section 207 are the consumers that cannot receive over-the-air signals using OTARD devices on property under their exclusive use due to a lack of line-of-sight, a lack of a balcony or patio, or other physical restrictions.

In the OTARD Second Report and Order, the Commission stated that Section 207 "applies on its face to all viewers," and that it "should not create different classes of 'viewers' depending upon their status as property owners."[203] However, in the very same decision, the Commission failed to follow its own mandate and created classes of viewers by disparately treating consumers that occupy MTEs. Under the rules adopted in the OTARD Second Report and Order, viewers in multi-tenant buildings who do not have a balcony or patio or do not have line-of-sight do not receive Section 207 protection. In order to remove this disparity, the Commission should also preempt MTE restrictions on access to common and restricted use areas for Section 207 devices, as requested in the Joint Petition.

B. Preempting MTE Restrictions On Access To Common And Restricted Use Areas For Section 207 Antennas Is Constitutionally Sound And Would Serve The Public Interest.

It is well within the Commission's authority to permit all viewers in MTEs access to a Section 207 device in common areas and restricted use areas. Contrary to the Commission's narrow interpretation, requiring access to these areas does not amount to a compelled physical invasion like the one at issue in Loretto v. Teleprompter Manhattan CATV Corporation.[204]

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203 OTARD Second Report and Order, at ¶ 13.

204 458 U.S. 419 (1982) (holding that a permanent physical occupation is a per se taking and remanding for a determination of just compensation).

Rather, it entails the regulation of rights and duties that already exist between building owners and their tenants.[205] Regulatory modification of the relative rights between building owners, landlords, and condominium associations on the one hand, and tenants on the other, is not a per se taking.[206] Indeed, the Commission recognized this fact in the Second Report and Order: "where the private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a per se taking."[207] The contractual relationship for viewers to occupy an MTE already is in place. By prohibiting building owners, landlords, and condominium associations from restricting tenants' access to video programming providers that use Section 207 devices, the Commission will only be adjusting that contractual relationship.

Section 207 is similar to the Virginia statute upheld in Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corporation.[208] The statute at issue in Multi-Channel forbade -- as does Section 207 -- restrictions imposed by landlords on tenants' access to competitive providers of video services. The Fourth Circuit found (1) that the statutory prohibition on such restrictions prohibited a use of the property and did not amount to a physical invasion, (2) that the statutory prohibition did not deny landlords the economically viable use of their land, (3) that the statutory prohibition did not deprive landlords of the rental income and appreciation on which

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205 The Commission is not restricted by the court's findings in Bell Atlantic because it is not a per se taking for the Commission to regulate the terms and conditions of a contractual arrangement.

206 See Loretto, 458 U.S. at 441 ("We do not . . . question . . . the authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.").

207 OTARD Second Report and Order, at ¶ 18.

208 65 F.3d 1113 (4th Cir. 1995).

their investment-backed expectations were presumably based, and (4) that a legitimate governmental interest was promoted by the statute. Each of these findings can and should be made with respect to Section 207's prohibition on restrictions of Section 207 devices in common and restricted areas.

The Section 207 protections must be extended to all viewers, including the millions in MTEs that do not have the ability to use a Section 207 device from within their private space. This is consistent with and effectively mandated by the procompetitive purposes of the 1996 Act.[209] If the Commission extends Section 207's protection to include all viewers in MTEs, not just the limited number that have balconies and unimpeded line-of-sight capabilities, the Commission will be promoting consumer welfare and competition and will be effectuating the mandate of the 1996 Act. Then, those viewers will have real choice among video programming providers, not one granted in name but absent in practice.

IX. THE COMMISSION SHOULD MODIFY SECTION 1.4000 OF ITS RULES TO INCLUDE FIXED WIRELESS DEVICES.

Upon achieving access to consumers in MTEs, fixed wireless carriers must not be prevented from placing their antennas on rooftops by local zoning or home owner association restrictions. It is particularly important that fixed wireless carriers receive the same protection as those carriers whose devices are covered by Section 1.4000 of the Commission's rules because of the convergence of communications systems. For example, LMDS providers, which are currently covered by Section 1.4000, will be able to provide services that compete with fixed wireless carriers that do not offer "video programming" and thus are not protected by Section 1.4000.

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209 S. Rep. No. 104-230, at 1 (1996).

The Commission must level the playing field so that all fixed wireless carriers receive the same protection from Section 1.4000.[210]

As demonstrated above, the Commission has broad authority under Titles I, II, and III of the Communications Act to implement rules in order to promote competition as intended by the 1996 Act. A Commission limitation on State and local restrictions of fixed wireless antennas is within its broad authority to regulate "all instrumentalities"[211] of radio communication so as to make available to all people of the U.S. a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[212] In addition, Section 303(r), which grants the Commission broad authority to regulate the provision of radio services, permits the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act . . . ."[213] These Sections alone grant the Commission the necessary authority to restrict State and local prohibitions on fixed wireless antennas.

Moreover, Section 207 of the 1996 Act provides the Commission with a principled basis for the exercise of ancillary jurisdiction to limit State and local restrictions on fixed wireless antennas. Section 207 recognizes the need to promote competition in the MVPD market by restricting State and local prohibitions on certain antennas which provide video programming. It is reasonably ancillary for the Commission to promote full competition between those carriers

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210 It is important to note that the modification of Section 1.4000 alone will not provide fixed wireless carriers a complete solution. Fixed wireless carriers must also obtain access to MTEs. Thus, the nondiscriminatory access provision discussed in great detail in Section IV, supra, also is required.

211 47 U.S.C. § 153(33).

212 Id. § 151.

213 Id. § 303(r).

providing fixed wireless services and those carriers providing both video programming and fixed wireless services by extending the protection of Section 1.4000 to cover all types of fixed wireless antennas.

A Commission prohibition on State and local restrictions also would be consistent with Section 332(c)(7) of the Communications Act. Section 332(c)(7)(B)(i)(II) provides that:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- shall not prohibit or have the effect of prohibiting the provision of personal wireless services.[214]

If a State or local restriction prohibits the placement of a fixed wireless antenna on a particular building, the fixed wireless carrier cannot provide service to consumers in that building using its fixed wireless technology. This has the effect of prohibiting the provision of personal wireless services. Fixed wireless carriers must place their antennas on the rooftops of buildings to serve customers in those buildings. Unlike mobile wireless service providers that may have alternatives for antenna placement should a State or local government restrict access to certain properties, fixed wireless carriers do not have alternatives. They are foreclosed from serving consumers in those buildings where local restrictions prohibit them from placing antennas on the rooftop of those buildings where the consumers are located. It is clear from Section 332(c)(7) that State and local restrictions which prohibit personal wireless services are not permitted. Hence, the Commission has the authority to extend Section 1.4000 to protect all fixed wireless carriers from State and local restrictions, and such an extension is not contrary to, and indeed is consistent with Section 332(c)(7).

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214 Id. § 332(c)(7)(B)(i)(II).

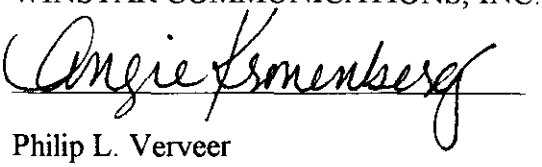
X. CONCLUSION.

For the foregoing reasons, the Commission should (1) adopt a nondiscriminatory access provision to multi-tenant environments for telecommunications providers; (2) fully implement Section 224 of the Communications Act and permit telecommunications providers to use utilities' rights-of-way and conduit over private, as well as public property; (3) modify its Part 68 rules and require that the demarcation point be located at the minimum point of entry in all multi-tenant environments; and (4) designate intra-building wire as an unbundled network element; (5) grant the

Joint Petition regarding the Commission's Second Report and Order in the over-the-air reception device proceeding; and (6) modify Section 1.4000 of its rules to include all fixed wireless devices.

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

By: 

Philip L. Verveer
Angie Kronenberg
Sophie J. Keefer
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

Robert G. Berger
Joseph M. Sandri, Jr.
Russell C. Merbeth
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W., Suite 200
Washington, D.C. 20036
Tel. (202) 833-5678

Of Counsel

August 27, 1999

ACCESS TO BUILDINGS AND FACILITIES BY TELECOMMUNICATIONS PROVIDERS

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON COMMERCE HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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ACCESS TO BUILDINGS AND FACILITIES BY TELECOMMUNICATIONS PROVIDERS

THURSDAY, MAY 13, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 2322, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Oxley, Stearns, Deal, Cubin, Shimkus, Pickering, Fossella, Blunt, Markey, Eshoo, Luther, Klink, Green, and McCarthy.

Also present: Representative Lazio.

Staff present: Mike O'Rielly, professional staff member; Cliff Riccio, legislative clerk; and Andy Levin, minority counsel.

Mr. TAUZIN. The committee will please come to order.

We have a very distinguished and very large panel this morning and so I will ask all of our guests to get seated and comfortable and we expect to hear a very good hearing today and to be a great deal more educated when it is finished. Let me first welcome all of you and thank the witnesses for coming today to discuss this very important issue of access to buildings and facilities by telecommunications providers.

First of all, let me tell you that I realize the issue can generate some rather heated debate. And I hope, instead of heat today, we, of course, shed a little light on some of the real confusion and expose the real issues that, perhaps we in Washington, can help resolve for you. The differences that lie between building owners and telecom providers can be seen in how the different entities refer to the subject matter. Building owners call it "forced access," saying that these companies are trying to force their way onto private property. Telecom companies call it "competitive access," feeling they need to get access to buildings in order to compete with other telecom providers who already are provided access.

The problem that members of our subcommittee are wrestling with is the fact that all of these entities feel very passionately about their positions and are both right to some degree. Clearly, it is my wish and the wish of others on the subcommittee that telecommunications providers be given the chance to compete and that means giving them access to customers in order that they can afford to offer them the choice for whom they want to do business with. In fact, that is what competition means: making a level play-

ing field, giving all the customers a chance to reach the companies they want to reach and the companies a chance to make their case and then, eventually, letting consumers decide who should be the winners and losers in the telecommunications marketplace.

On the other hand, as a champion of property rights, it troubles me when the government wants to tell a private property owner what to do with their private property. And, therefore, it is my hope that the hearings we have today will serve as an attempt toward some sort of compromise, some arrangement, some agreements that will get us the best of these two very important worlds. We must take a look to see where access to buildings is working. I think the representatives from RCN, Winstar, and ALTS can give us some success stories where access was allowed and competition has flourished. They can, unfortunately, also point out a significant number of instances where entry has been delayed or prevented.

On the other hand, building owners, realtors, and apartment association representatives will tell us situations where they feel access was acceptable and, indeed, prosperous. They are also in the unenviable position of having to defend building owners or managers that have used the access control to create a new bottleneck, preventing customers from getting the service that they want.

Consumers want choice in our marketplace and want to be able to get the latest and the greatest technology. That includes the speed at which they can surf the Internet, the number of services they can get on one bill, and the lower prices that competition usually helps provide. FCC has also been invited to discuss with us today what they are doing, what they are working on, and provide us with a sense of timing as to when the FCC itself will complete items that they have or will be having before them on both sides of the inside wiring and the building access issues.

Clearly, there is a lot to consider today. As I said earlier, there is a chance to start dialog and perhaps shed more light than heat. I believe that there is room, indeed, for some sort of balanced compromise. I want to thank, again, the witnesses in advance and I am pleased to welcome now the ranking minority member from the great State of Massachusetts, my friend Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much and I want to commend for calling this hearing. And I think you are correct that we are going to work together with all of the parties if we are going to be able to resolve this very complex issue. This issue is very important if we are going to advance the subcommittee's telecommunications competition policy across all services, be it video, data, and voice communications.

The Telecommunications Act of 1996 contained numerous provisions that repealed or removed barriers to competition. Some of the witnesses at our hearing today represent companies that, in many cases, either would not exist or would not be competing today in certain markets but for passage of the Telecommunications Act. I am not fully satisfied however and I don't think most other members of this subcommittee are either with the progress we have made thus far in providing greater competition to incumbent cable and incumbent telephone companies.

One complaint from competitors that returns to us over and over again is the issue of access to office buildings and multiple dwelling

units. The Telecommunication Act did not contain a specific provision relating to building access for telecommunications services, yet Congress did include section 207 which required the FCC to preempt restrictions on the placement of over-the-air devices to receive video programming. Moreover, the Commission has some underlying authority, such as pole attachment provisions and inside wiring regulations, that can affect building access for competitors. I am eager to hear from our witnesses this morning on their views as to the applicability of these provisions and the effectiveness of these rules.

The issue of access to buildings and MDUs is one that not only is vital to the growth of video data and voice competition, but also forces policymakers to wrestle with questions of building security and tenant safety, compensation for building owners, and constitutional arguments raised with respect to government-mandated access to private property. I am hopeful that we can pragmatically address many of the legitimate concerns of building owners to achieve a result that serves to bring more choices and lower prices to tenants and continues to fuel American economic growth in this important marketplace.

Mr. Chairman, I thank you for holding this hearing and I look forward to hearing from the witnesses.

Mr. TAUZIN. Thank you, Mr. Markey. I am pleased to also welcome my friend from Georgia, Mr. Deal for an opening statement.

Mr. DEAL. Thank you, Mr. Chairman. I don't have an opening statement and look forward to the testimony.

Mr. TAUZIN. Thank you, Nathan. Indeed we have an incredible array of witnesses today and we want to get them going as quickly as we can. Let me first admonish you that we have your written statements and they are good and we thank you for that. And we are going to read them over and over again and more than once before we resolve this issue so please don't read your statements to us. You can see, we try to conduct this very informally in the sense that we would like you to have conversation with us and give us the highlights of what you came here to tell us today and make your best points. We will have a little timer and you all get 5 minutes to do it. We appreciate it. We have to do it that way. And the members will have 5 minutes to dialog with you and I hope out of it, as I indeed pointed out, comes a lot of understanding and perhaps some resolution.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. MICHAEL G. OXLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Thank you, Mr. Chairman, and welcome to our witnesses.

As we all know, the purpose of the '96 Act was to remove barriers to competition. The question before us today is whether restricted access to office complexes and apartment buildings for telecommunications competitors poses a barrier to competition.

In the case of local telephone competition, where some new entrants plan to employ wireless technologies to provide facilities-based competition, the inability to access rooftops to place antennae to serve occupants does appear to serve as a barrier to market entry.

The proposed solution—that building managers should be required to offer reasonable, non-discriminatory access to telecommunications competitors in exchange for full economic compensation—is offered as a way to promote growth and competition

by removing a market distortion favoring incumbent carriers. I believe it is an idea worth exploring, so I commend the Chairman for holding this morning's hearing.

Thank you, Mr. Chairman. I yield back.

PREPARED STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman: Thank you for calling these hearings. The issues before us are quite weighty and they magnify the state, or lack thereof, of competition in the telecommunications industries.

I had hoped this hearing would focus on the issues of building access, as I think they will, but our Subcommittee should devote another hearing entirely to the subject of facilities access.

Issues surrounding facilities access for competitive telephone and cable providers are different from the issues affecting building access. I encourage my Chairman to hold such a hearing in the near future.

As my colleagues know, I do believe our own individual states and localities should play the paramount role in the regulation of telecommunication providers, with the federal government and federal regulators playing a complementary role.

However, Congress and the FCC must lead when barriers to competition are evident and where national telecommunications policy needs to be addressed.

This is what drove us to action to create the Telecommunications Act of 1996. Our nation was in need of federal policy to deliver competition at the local level. Unfortunately, some have delayed competition by choosing to challenge provisions in the Act or challenge how the Act was being implemented.

If Congress and the FCC is forced to act on building access and we are challenged in court, I am confident the courts will continue to recognize our authority in opening uncompetitive markets and industries.

Some will argue about the constitutional provisions protecting private property and I would agree with them.

But in many multi-tenant residential buildings, the tenants *own* their condominiums or apartments and they are denied access to competitive telephone or video services by their property management.

Do these owners not deserve the constitutional protection of private property and, therefore, do they not have the right to receive competitive telecommunication services?

There is no question that access to multi-tenant residential and office buildings is fundamentally important in achieving competitive structures in telecommunications. Without the ability to serve these type of customers, competition in telephony, video, and data services will be stifled.

I believe that sensible solutions to allow sensible access to buildings for competitors is in every one's interest.

I think it is in the building owners interest, and I think they will agree, to provide the best services to retain tenants and to attract tenants. That is why reaching an agreement on building access is achievable.

I had hoped and still hope that the issue can be settled at the state level to allow our states and localities develop policies to achieve competitive access. My home state of Florida had before the state legislature maybe the preeminent bill in the nation concerning access.

The Florida building access bill provided mandatory access for telecommunications carriers to tenants in multitenant buildings on reasonable, technologically neutral, and comparable terms and conditions.

As I understand, all the players concerned from competitive telecommunication providers, incumbents, and building owners were on board with a compromise agreement as the bill was moving through the Florida House.

They reached a settlement that all sides were not entirely satisfied with, but all realized the agreement was the most reasonable approach to achieving building access.

Then for typical political reasons, the bill was held up for personal considerations. The problem remains that if our states capitulate to political obstruction and allow barriers to competition to continue to exist, Congress and the FCC will be forced to step in and create solutions to allow reasonable building access.

I look forward to today's testimony and I hope the witnesses can address the Florida bill and suggest if the Florida bill was an adequate compromise or is there a better solution? Additionally, do you think the Florida legislation can be used as a model for the federal government?

Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this important hearing on access to buildings and facilities by telecommunications companies.

The importance of facilities based competition in local telecommunications markets cannot be understated. The competitive industry has a legitimate complaint about not being allowed into residential buildings. However, not all legitimate complaints warrant government involvement.

Two months ago I facilitated a forum in Wyoming on the placement of communication towers. The problem we were trying to resolve had to do with telecommunications providers not being allowed to place much needed cell towers in areas where they can deliver the best coverage and the most advanced services.

Instead of legislating a solution, the meeting educated the public and the public ended up driving the debate on why cell towers are important for public safety, and essential for increasing modern communication services.

I see the issue with accessing buildings in the same way. If there are enough tenants of multi-dwelling units who are unhappy with their current telephone, cable, Internet or any other utility service, they have the option to demand that their building manager or owner change it.

The bottom line is that the building managers and owners are responsible for taking care of their tenants' needs. If the tenants are unhappy with their current telecommunication services, something will need to change.

Congress isn't going to promote competition in this regard: it's going to be the consumer who demands competition by purchasing the latest, greatest and least expensive technology and telecommunications services.

These services are currently available and should be available for people to choose from, but it should not come at the expense of trampling the rights of private property owners.

Mr. Chairman, I look forward to hearing from the witnesses today and yield back the balance of my time.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you Mr. Chairman, I also want to thank you for holding this hearing.

This is an important hearing because it's about *competition*. Competition brings consumers long-term benefits. Competition is the best mechanism to ensure low rates. Competition also brings better service and more choice.

Competition also poses a problem for incumbent providers. Incumbent providers have two ways to respond to competition: meet consumer demand, or perish.

The Telecommunications Act of 1996 says that, as a matter of law, all telecommunications markets are open to competition. The local telephone market, once closed to competition, is no longer a legal sanctuary for monopolists.

Since the Act's passage, critics of the law have complained that competition has not developed quickly enough. These critics, however, choose to ignore the wealth of evidence that shows competitors are making progress.

True: we'd all like to see *more* competition. But the solution there is *not* to turn our backs on the progress we've made. *Instead*, we should focus on ways to remove the remaining obstacles to competition.

Which brings us to the subject of building access, the so-called "last hundred feet."

This is an important component to promoting competition in local telephone markets. Consumers who live in apartment or commercial buildings are no less entitled to the benefits of competition.

I am therefore concerned when I hear charges that building owners and managers go a long way to deny competitors access to their properties. I know how difficult it must be to accommodate new folks seeking access to office buildings and apartments. However, some building owners and managers are mistakenly restricting access.

I recognize this is not true of all building owners. Some owners and managers support competition in retail sales of electricity, which pleases me. Many owners have done the right thing for their tenants and opened their door to competition.

So we need to find an answer to the following question: how do we take care of the "bad actors?"

The FCC has done some good work in this area. But much work remains, and the FCC ought to be using its power to help us find some solutions.

Let me also say that I strongly support collaborative solutions to this problem. I applaud those building owners and telecommunications companies that have tried to fashion a compromise, and urge you to continue your good work.